No. 88-237

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

PAUL EMILE NOEL,

PETITIONER,

vs.

DEPARTMENT OF SANITATION
OF THE CITY OF NEW YORK,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK STATE SUPREME COURT OF
APPEALS : FIRST DEPARTMENT

PAUL EMILE NOEL
PRO se
101 LAFAYETTE AVENUE
APT. 3-E
BROOKLYN, N. Y. 11217

QUESTIONS PRESENTED FOR REVIEW

The endorsed complaint alleges that the Sanitation Department damaged the plaintiff's property and some of his belongings were stolen while in possession of their department after said property was sold at public auction on August 24, 1981. The New York State Court of appeals disallowed petitioner's brief by virtue that this legal action for money judgment evaluating $50,000 was barred by statute of limitations without putting the burden on the City of New York for its negligent conduct for keeping on file the notice of claim that breached their duty owing to the petitioner until its release on September 23, 1986.

Was the petitioner's suit properly dismissed as based on an allegedly wrongful holding of the petitioner's property in 1981? The State Court of Appeals didn't arrive at that conclusion.

Should the Supreme Court of the United States be empowered to ask what happens to the proceeds when a person's belongings are auctioned by

the Bureau of Encumbrances of the Department of Sanitation?

Did the petitioner ever receive any part of that money which was wrongfully withheld from him?

Due process by the petitioner demands eligibility of his claims and judgment so appealed from be reversed with costs and interest.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

Paul Emile Noel,

Petitioner,

vs.

Department of Sanitation of

the City of New York, Respondent.

Petition for Writ of Certiorari to the

New York State Supreme Court of

Appeals: First Department

REQUEST FOR ISSUANCE OF THE WRIT

The petitioner pro se, Paul Emile Noel, is asking this Court to issue a writ of certiorari to review the decision of the state court of appeals, first department, entered on April 6, 1988; on such review the opinion and judgment in this cae should be reversed and the cause of action remanded with directions to reim-

bursement + interest and the relief to be provided according to the power granted to the Court by all writs act 28 USC 1651(a).

OPINION BELOW

The state court of appeals entered its memorandum decision affirming that an appeal having been taken to this Court by plaintiff from a judgment of the Civil Court of New York entered on the 25th day of February 1987 and said appeal having been heard and due deliberation having been had thereon, and it is ordered and adjuged that the judgment so appealed from be and the same is hereby affirmed without costs; dismissed the petitioner's complaint on the ground of statute of limitations. A copy of the judgment from the Civil Court which decision is asserted in the last page of the minute included the memorandum decision and order upon motion dated July 22, 1988 seeking remedies as requested by the Supreme Court on May 13 and June 24, 1988 from the Court of appeals is attached as appendix 1a, 1a suit 2a, 3a, 4a, 4a suite).

JURISDICTION

On April 6, 1988, the State Court of appeals

entered judgment dismissing the petitioner's complaint on the ground of statute of limitations on a money judgment relating loss of personal property, factors which cause homelessness, and negligent conduct of the municipal administration without paying attention that the respondent acted in a way violative and auctioning money is not released. The jurisdiction of this court is invoked in accordance of 311 of CPLR of the general municipal law due to a combination of several conditions: abusive tactics of the landlord which cause homelessness and loss of personal property due to carelessness and negligence of the department of sanitation with a combined evaluation of $50,000 at $25,000 against each defendant. Petitioner's property was taken out of his apartment on June 1, 1981 by a marshal despite the fact that he had paid his landlord three months' rent and a deposit as rent security confirmed by him at his attorney's office when he stated that he did receive the payment but wanted to discuss a matter with the peti-

tioner on the lease by sending a certified mail # 286846871 (app. 5a) and then said property turned over to the department of sanitation. The trial judge marked in evidence: his notice of claim, a letter from the department of sanitation indicating his property was sold at public auction on August 24, 1981, the receipt he signed when he obtained his clothing and papers from the respondent (app. 6a,7a,8a,9a). As the record adequately demonstrates that petitioner is being victimized and suffered misfortune in having his property sold by the department of sanitation and based on substantial evidence that the decision of the petitioner for the relief demanded should be affirmed in all respects.

CONSTITUTIONAL PROVISION INVOLVED

... Immediately after the sale of property auction proceeds are remitted by the department of sanitation Commissioner to the City Finance Department. Simultaneously the comptroller receives a breakdown of the amounts received for particular articles or lots. After the comptroller deducts administrative expenses

(the rates are set by the department of sanitation) and credits these to the City and the remainder of the monies realized from such sale shall be paid to the lawfull owner (s). BOARD OF ESTIMATE PROCEEDING, Res; CAL No. 57 (March 11, 1965)

STATEMENT OF THE CASE

Petitioner filed a notice of claim with the City of New York (app. 6a) which was served on October 15, 1981 through counsel, after a marshal wrongly evicted the petitioner from his apartment without a notice and few days after the eviction, petitioner found that a warrant issued in an eviction action was filed with the civil court (app. 10a) on behalf of the landlord. Counsel withdrew from the case on June 16,1982 because of the negligent conduct of the municipal administration for not returned the notice of claim to him to prepare timely the summons and complaint until on September 23, 1986 when the claimant received it after the said counsel in his last effort urged the comptroller's office to have it proceeded (app.11a,12a,6a,7a). That on

October 24, 1986, petitioner requested a hearing to the clerk which it has been held on December 4, 1986 and the evidence adduced at the hearing showed that petitioner was victimized by the department of sanitation and the corporation counsel which supposed to bring the landlord as also a co-defendant in this combined demand to answer his part at the Trial before the Civil Court was absent without living a legal notice to excuse himself. The judge after inquest dismissed the complaint in favor of the respondent and thereafter petitioner commenced a civil action to perfect an appeal in the supreme court of the State of New york which argument had been held and heard at a November 1987 Term.

REASON FOR GRANTING THE WRIT

The only reason to be determined by the Court for granting this writ is that justice has not yet been done in this case and the state court of appeals as constituted with Hons; Jawn A. Sandifer, Stanley S. Ostrau and Edith Miller in its decision should grant the petitioner for the relief demanded instead

of dimissing it in favor of the respondent on the ground of statute of limitations. Alternatively, the state court of appeals didn't develop the record adequately to determine abusive tactics and negligence of the respondent et al, because respondent failed to state fact sufficient to entitle to this judgment in accordance of 311 of the CPLR and 50(i) of the General Municipal Law and the respondent's defense that petitioner supposed to have a year and 90 days on the summons and complaint could only be applicable begining September 23, 1986 the date that he obtained it from the City of NEW York (app. 12a).

In this case should any plaintiff has right to prepare a summons and complaint with the Civil Court without assuming that his notice of claim was properly endorsed or released by an examiner? If no, when can the statute of limitations should be applicable under any circumstance? ... Even if respondent persuades to rely on the statute of limitations, the judgment appealed from supposed to be favorable to the petitioner because the Department of Sanitation didn't present " prima facie" proof of a cause of action indicating

that it was not intentional to withheld the remainder of the monies realized from such auctioning sale as outlined in sections of the regulations of Board of Estimate Proceedings and furthermore respondent endorsed the debt of the landlord as he was told to do so in refusing to bring him at the appeals to answer this combined demand on file with the City of New York (app. 13a) for the purpose mentioned above and the ultimate goal of the judicial system is as-certain the truth. A court should admit any evidence aiding the Court in its search, Todem Homes,Inc vs. Freidu 84 misc; 2d; 1023, 374 NYS. 2d 923, 930 (SUP. CT; 1975). Evidence which is logically relevan should be admissible unless barred by some specific rule or principle of law 31 A.C.J.S. , " Evidence" 158 at 428-29 (1964). See Guilianelle vs. Brownell, 7 A.D. 2d; 691, 179 NYS 2d 344, 346 (1958). Relevant evidence tends to prove or disprove a fact from which the existence or non existence of fact in issue can be directly inferred; the evidence is relevant 31 A C.J.S. supra 158 at 426-27

see Barr vs Dolphin Holding Corp; 141 NYS 2d. 906, 908 (NY SUP; CT. 1955). " Revelant" as applied to evidence must be understood as touching on the issue which the parties have made by their pleadings, so as to assist at getting at the truth.

The court also should stand in a way to make of substantial justice as the Supreme Court of Wisconsin said as long ago as 1917: " this Court sits here to do justice between litigants for the purpose of orderly administration and the attaintment of justice that certain rules are established. Any rule, the enforcement of which results in a failure of justice, should be carefully scrutinized and blindly adhered to unless the abandonment of it will work more injustice than will follow if it be adhered to. Cappon vs. O'Day, 165 Wisc; 486, 162 N.W. 655,657 (1917)." Evidently the State Court of Appeals erred in refusing to grant relief to the petitioner as the evidence sets there and it should have ordered relief rather than have countenanced perjury and it is the decision of the petitioner

in this case which must be hold and it is further requested that the Supreme Court rejects the argument of the Respondent raised on the ground of statute of limitations because it is due to their own negligence for keeping on file the notice of claim until its release on September 23, 1986 by giving full eligibility to the claims demanded.

CONCLUSION

Based on a thorough evaluation of the evidence and regulations of the Board of Estimate, it is reasonable to conclude that the judgment appealed from should be reversed in all respects and in regard to it, the Respondent failed to sustain the burden of proof within the meaning of the act required by the City Board of Estima to promulgate rules and regulations governing the redemption and auctioning of anyone property held by the Department of Sanitation without reimbursement and thus petitioner should be entitled for full costs and interest.

DATED : Brooklyn, New York

May 9, 1988

Respectfully submitted.

PAUL EMILE NOEL

PETITIONER PRO SE

APPENDIX

Index No. 4388/85
86 N 12342

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK
80 Centre Street

Paul Emile Noel,

Plaintiff,

against

Department of Sanitation of the City of New York

Defendant.

DECISION

PRESENT:

HON. SEYMOUR SCHWARTZ,

I hereby find and decide that after inquest judgment for defendant dismissing the complaint. See decision on records; and I order and adjudge that said defendant have judgment accordingly.

Dated, New York City, December 4, 1986

Seymour Schwartz

Judge.

Al Piekarsky

Court Reporter

This form to be used where the successful party has appeared without attorney

Index No. 4388/85

Civil Court of the City of New York

County of New York

Paul Emile Noel,
Plaintiff

Against

Department of Sanitation
Of the City of New York,
Defendant.

DECISION AND JUDGMENT

I hereby find and decide that after inquest judgment for defendant dismissing the complaint. See decision on record and said Plaintiff - Paul Emile Noel having appeared without attorney, the Clerk is hereby directed to enter judgment accordingly. See attached decision.

JUDGMENT

Judgment is rendered in favor of the defendant, Claim # T111914, Dept; of Sanitation, 125 Worth ST; NY, NY, and against Plaintiff, Paul Emile Noel, 648 East 40th Street, BKLYN, NY 11203 for dismissing the complaint with $ 165 costs and disbursements as taxed, amounting in all.

Dated, February 25, 1987

Frances Tombini
Chief Clerk

-1a suite-

Court's Decision

The COURT: On the record.

After Inquest the summonse and complaint are dismissed.

Plaintiff failed to timely serve the summonse and complaint upon defendant the City of New York.

The Notice of claim was served in 1981 and the notice and the summonse and complaint in 1985.

****

Certified to be a true and correct transcript of my stenographic notes taken December 4, 1986 in Part: Personal Appearance, before Hon. SEYMOUR SCHWARTZ, Judge.

Alfred Piekarsky
Court Reporter

AT an Appellate Term of the Supreme Court, 1st Department, held at the courthouse, Borough of Manhattan, City of N.Y., on the 6th day of April, 1988.

PRESENT: Hons: Jawn A. Sandifer, J.P., Stanley S. Ostrau, Edith Miller, JUSTICES

Paul Emile Noel

Plaintiff-Appellant
-against-
Department of Sanitation of City of New York,

Defendant-Respondent.

County Clerk's No. 92407/87

Cal. 87-464

November 1987 Term

An appeal having been taken to this court by plaintiff from a judgment of the Civil Court of the City of New York entered on the 25th day of February 1987 and the said appeal having been heard and due deliberation having been had thereon, IT IS ORDERED AND ADJUGED, that the judgment so appealed from be and the same is hereby affirmed, without costs.

Enter,

Justice, Appellate Term,

Supreme Court, First dept.

New York Supreme Court

Appellate Term, 1st Department

Paul Emile Noel,
Plaintiff
-against-
Department of Sanitation of
the City of New York

APPELLATE TERM - ORDER AND NOTICE OF ENTRY

Please take notice, that an order, of which the within is a copy, was duly entered in the office of the clerk of the Appellate Term of the Supreme Court in and for the First Judicial Department on the 6th day of April 1988.

Yours, etc...

PETER L. ZIMROTH
Corporation Counsel
Attorney for DEF.-RESP.
100 Church Street
New York, N.Y. 10007
TEL: 566-8598

TO: Paul Emile Noel, Pro se
648 East 40th Street
Brooklyn, N.Y. 11203

At an Appellate Term of the Supreme Court, 1st dept., held at the Court House, Borough of Manhattan, City of New York, on the 22nd day of July, 1988

PRESENT: HONS. JAWN A. SANDIFER, J.P., STANLEY S.OSTRAU, EDITH MILLER, JUSTICES

PAUL EMILE NOEL, PLAINTIFF-APPELLANT

- against -

DEPARTMENT OF SANITATION OF THE CITY OF NEW YORK; DEFENDANT-RESPONDENT.

ORDER UPON MOTION

92407/1987

Cal. No. 87-464

November 87 Term

The above named appellant having by notice of motion dated the 29th day of June 1988 moved for an order granting leave to appeal to the Appellate Division -First Department- from an order of this Court dated April 6, 1988.

Now upon reading and filing said notice of motion and the affidavit of Paul Emile Noel verified the 29th day of June 1988 and the papers annexed in favor of said motion, and the statement of Alan G. Krams affirmed the 5th day of July 1988 and the papers annexed in opposition thereto,

It is ordered that said motion be and the same hereby is denied with $10 costs.

Enter,

Justice, Appellate Term, Supreme Court, First Department.

-4a suite-

GARDEN STATE NATIONAL BANK NO. 1212788

PARAMUS, NEW JERSEY 07652
" A Fidelity Union Bancorporation Bank"

PAY TO: Joseph St. Rose, Landlord DATE: May 1, 1981

1042 Rogers Avenue $ 195,60

Brooklyn, N.Y. 11226 Paul Emile Noel

PERSONAL MONEY ORDER 825 Crown Street, Apt.

B7, BKLYN, N.Y. 11213

Receipt for certified mail sent by Joseph St. Rose, P 28 6846871 dated May 5, 1981 with a note indicated that money order is being received and this is not your proper rent. Your lease expired October 1980 and I have offered you a new lease but you do not accept it. If you want to discuss the matter, you can see me at 1042 Rogers Avenue, Phone 284-0800

Very truly yours,

Joseph St. Rose

P.S. Please note this notice never received by the tenant, it has been returned by St. John's Post Office to Mr. St. Rose sometimes after the eviction due to the delay.

IN the matter of the Claim of

PAUL EMILE NOEL

-against-

The City of New York

DEPARTMENT OF SANITATION

NOTICE OF CLAIM

NO. 111914

TO: Comptroller of the Gity of New York

Please take notice that the claimant hereby make claim and demand against the City of New York as follows:

The name of the Claimant and of his attorney

Claimant: Paul Emile Noel
648 East 40th St
Brooklyn 11203

ATTORNEYS: Grossman, Neidorff, Ribaudo, Weimbaum, 26 Court S
Brooklyn, NY

The nature of the Claim: lost of personal property due to carelessness, and negligence of the defendant, its agents, servants and employee

The time when, the place where and the manner in which the claim arose: that on or about the 24th day of August, 1981 at 172 Vanderbilt Avenu Brooklyn, New York or at 125 Worth Street, New Y claimant's personal property was damaged or stolen while in the possession of the City of New York, Department of Sanitation of the City of New york, their agents, servants and employee

The items of damage or injuries claimed are: Personal property consisting of three rooms of furniture and furnishings in addition to 1 Stereo; 1 Television Set; Bookcases, Kitchen utensils, etc.

That said claim and demand is hereby presented for adjustment and payment.

PLEASE TAKE FURTHER NOTICE that by reason of the premises, in default of the City of New York to pay to the claimant by statutes in such cases damages in an amount which exceeds the jurisdictional limitation of all lower courts which would otherwise have jurisdiction.

Dated: Oct. 13, 1981 Respectfully yours,

GROSSMAN, NEIDORFF, RIBAUDO & WEINBAUM
26 Court St, BKLYN
237-0500

Paul Emile Noel, Claimant

State of New York, County of Kings SS:

Individual verification, he is Paul Emile Noel, the claimant herein, that he is being duly sworn, deposes and says that he has read the foregoing notice of claim against the City and knows the contents thereof and he believes the alleged information is to be true

Sworn to before me, this 13th day of Oct.81

Paul Emile Noel

Samuel Weinbaum, Notary Public

The City of New York

DEPARTMENT OF SANITATION

125 WORTH STREET

NEW YORK, N.Y. 10013

September 9, 1981

Seizure No. V-6595

To whom it may concern:

This is the verify that the property belonging to Mr. Paul Noel, 825 Crown Street, Brooklyn, New York was received by the Department of Sanitation on 6/1/81 and was sold at public auction 8/24/81.

Sincerely,

Ms. L. Solis
Encumbrance Unit
Office of the Chief Clerk

LS/rhw

D. D.S. 178 -4/77

BKLYN ENCUMBRANCE DEPOT
172 Vanderbilt Avenue
Brooklyn, New York

The City of New York
Department of Sanitation
125 Worth Street
New York, N.Y. 10013

CLOTHING AND PERSONAL PAPER RELEASE
TO Vanderbilt Voucher, Encumbrance Depot

Paul E. Noel, who was evicted from 825 Crown Street, Apt. B-7, Brooklyn, New York on 6-1-81, may obtain clothes and personal effects from Lot No. 6595.

Please record below what is taken, and have Paul E. Noel sign.

Listed below are the personal effects and clothing received by me from lot 6595 on 6/3/81.

1. Paper + Clothing + typewriter

Articles Checked and Verified by: J.T.

Signature of authorized
Person: Paul Emile Noel

L & T Form 1 - Rev 43-2121

Index No. L & T 52895/81

CIVIL COURT OF THE CITY OF NEW YORK
County Of
HOUSING PART

Joseph St. Rose, Petitioner

against

Paul Emile Noel, Tenant

NON PAYMENT
Final judgment of possession Upon respondent's failure to Answer

---

Notice of Petition served 4/7/81, respondent defaulted, having failed to answer the notice of petition herein, FINAL JUDGMENT OF POSSESSION is made in favor of the Petitioner against the respondent-Tenant, awarding the said petitioner the delivery of the possession of the premises described in the petition by reason of non payment of rent, it appearing that copies of the notice of petition have been served personally on the Respondent and that the notice contains a notice that demand is made in the petition for judgment for rent in arrears and the amount of rent due to the Petitioner against the Respondent for $ 518. Judgment is given to the Petitioner against the Respondent.

Issuance of warrant stayed to and including

Dated May 7, 1981 Judge of Civil Cou

Law Offices

Neidorff, Ribaudo & Weinbaum

58 Hilton Avenue
Hempstead, New York 11550

Brooklyn Office
26 Court Street
Brooklyn, N.Y.
(718)-237-0500

September 15, 1986

Mr. Benedict P. Santeramo
Chief, Bureau of Law and Adjustment
The City of New York, Office of the Comptroller
Municipal Building (Room 622), NYC. 10007

RE: Noel v. The City of New York

Dear Sir:

I hereby authorize you to give a copy of the notice of claim that was served on you on October 15, 1981 to Mr. Paul Emile Noel, since I withdrew from the case on June 16, 1982.

Thank you for your cooperation and attention.

Very truly yours,

Samuel Weinbaum

W: mg

by: m.g.

The City Of New York
Office of the Comptroller
Municipal Building
New York, N.Y. 10007

Harrison J. Goldin
Comptroller

9/23/86

Paul Emile Noel

648 E. 40th St.

Brooklyn, N.Y. 11203

RE: T-111914

Dear Mr. Noel,

As requested in your letter to Corporation Counsel dated September 16, 1986. We are enclosing your original Notice of Claim which was received October 15, 1981.

Sincerely,

Joseph Leavy
Sr. Examiner
Bureau of Law and
Adjustment.

OFFICE OF THE COMPTROLLER,

BUREAU OF LAW AND ADJUSTMENT

NOTICE OF CLAIM UNIT

MUNICIPAL BUILDING, ROOM 622

NEW YORK, N.Y. 10007

CLAIM NUMBER T-111914

Claimant's name: Paul Emile Noel

Date of Request: 10/19/81

Pursuant to General Municipal Law, Sec. 50-e, the total damages to which Claimant deems himself entitled is as follows:

As to Claimant: Paul Emile Noel $50,000

Claimant signature:

Paul Emile Noel

Samuel Weinbaum
Attorney for plaintiff
Grossman, Neidorff,
Ribaudo & Weinbaum
26 Court Street
Brooklyn, N.Y. 11242

IN THE
SUPREME COURT OF THE UNITED STATES

Paul Emile Noel,

Petitioner

vs.

Department of Sanitation of NYC.

Respondent.

PROOF OF SERVICE

State of New York)
County of Kings) s.s.:

Petitioner, Paul Emile Noel, after being duly sworn, disposes and says that pursuant to Rule 28.4 (a) of this Court he served the within petition for writ of certiorari with asserted opinions of the State Court of appeals, First Department dated July 22, 1988 as requested by the Supreme Court (app. 4a, suite) on May 13 and June 24, 1988, on Counsel for respondent, Peter L. Zimroth, Corporation counsel, 100 Church Street, New York, N.Y. 10007 by enclosing it in an envelope, first class postage prepaid and depositing same in the United States mails at Brooklyn, New York on August 3, 1988.

Subscribed and sworn to
Before me this 3rd of August 1988

ASHVIN R. PATEL
NOTARY PUBLIC, State of New York
No. 41-4799045
Qualified in Queens County
Certificate Filed in Kings County
Commission Expires September 30, 19__

PAUL EMILE NOEL
Pro se

No. 88-237

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

PAUL EMILE NOEL,

Petitioner,

-against-

DEPARTMENT OF SANITATION OF THE CITY OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE NEW YORK SUPREME COURT, FIRST DEPARTMENT

PETER L. ZIMROTH,
Corporation Counsel
of the City of New York,
Attorney for Respondent,
100 Church Street,
New York, New York 10007.
(212) 566-8598 or 4330

LEONARD J. KOERNER,*
FAY LEOUSSIS,
ALAN G. KRAMS,
of Counsel.

*Counsel of Record

28 pp

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to issue a writ of certiorari when petitioner failed to ask a higher State appellate tribunal to exercise its discretionary authority to review the order challenged by petitioner?

2. Is any federal question raised by petitioner when his lawsuit is based on alleged negligence causing loss of his property, and the suit was dismissed as barred by a statute of limitations requiring such actions to be brought within one year and ninety days after the events at issue?

TABLE OF CONTENTS

APPENDIX:

TABLE OF AUTHORITIES

No. 88-237

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

PAUL EMILE NOEL,

Petitioner,

-against-

DEPARTMENT OF SANITATION OF THE CITY OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE NEW YORK SUPREME COURT, FIRST DEPARTMENT

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1257:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court.

STATEMENT OF THE CASE

On June 1, 1981, a marshal evicted petitioner from his apartment pursuant to a valid warrant issued in an eviction action filed in the Civil Court of the City of New York (14).[1] (Appellant's Brief to the Appellate Term of the New York Supreme Court at 7, 16) (hereinafter "App. Br."). The marshal left a notice advising petitioner to contact the New York City Department of Sanitation to locate the property that was removed from his apartment (App. Br. at 9). The notice advised plaintiff that "your property will be held for a period of approximately 30 days and unless called for will be sold or otherwise disposed of by the Bureau of Encumbrances of the Department

---

[1]Numbers in parentheses refer to pages in the Record on Appeal to the Appellate Term of the New York Supreme Court.

of Sanitation" (App. Br. at 9). Two days later, petitioner obtained his clothing, some papers, and a typewriter from respondent (25). On August 24, 1981, the remainder of petitioner's property was sold at auction (26).

In October 1981, petitioner, through counsel, filed a notice of claim with the New York City Comptroller alleging that respondent had "damaged or stolen" petitioner's property on August 24, 1981, the date it was sold (27). In 1982, counsel withdrew from his representation of petitioner (20).

In January 1985, petitioner filed this action in the Civil Court of the City of New York, alleging "[l]oss of personal property due to carelessness and negligence" by

respondent on or about the sale date (A-1).[2] Respondent's answer denies the allegations in the complaint and raises two affirmative defenses: (1) that the suit is barred by the one-year and ninety-day statute of limitations in section 50-i of the New York General Municipal Law and (2) that the summons and complaint were not properly served (Supplemental Record on Appeal to the Appellate Term at 1).

Trial was scheduled for December 4, 1986; respondent did not appear, and an inquest was held (10). The Trial Judge offered to adjourn the case to enable petitioner, appearing pro se, to seek counsel, but petitioner insisted on proceeding (12). He reiterated that he was

---

[2]Numbers preceded by the letter "A" refer to pages in the Appendix annexed to this brief.

complaining about "carelessness and negligence" by respondent (A-3) and was allowed to submit various documents as evidence (8 15-17, 25-27). The Trial Judge asked petitioner if he had any further testimony or documents to offer, and plaintiff said he had nothing more (17). The Court dismissed the complaint as untimely, saying "[t]he notice of claim was served in 1981 and the notice and the summonse [sic] and complaint in 1985" (18).

Petitioner appealed to the Appellate Term of the New York Supreme Court, First Department, which unanimously affirmed the Civil Court's judgment, without opinion. Pet. for Cert. at 3a. Petitioner then moved before the Appellate Term for leave to appeal to the Appellate Division of the New York Supreme Court, and respondent opposed, arguing inter alia, that the motion was

untimely (A-7, A-9). The motion was denied (A-6).

Petitioner never pursued further review in the State appellate courts, as he was entitled to do. Instead, he filed this Petition for Certiorari with this Court.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to issue a writ of certiorari because petitioner has not sought relief from the highest court in New York in which a decision could be had. Petitioner has never asked the Appellate Division of the New York Supreme Court to exercise its discretion to review the Appellate Term's order.

Moreover, the petition does not raise any colorable federal claims. Petitioner's lawsuit, which sounds in negligence, was dismissed as barred by the one year and 90-day statute of limitations. The enactment of limitations statutes to control actions

based on state law is a state prerogative, raising no constitutional issues. Nor do the merits of this tort action provide any basis for granting certiorari. Since negligent acts of government officers are not actionable as violations of the Due Process Clause, and no other constitutional provision is implicated here, there are no federal issues for this Court to review.

REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

THIS COURT LACKS JURISDICTION TO GRANT CERTIORARI BECAUSE THE DECISION SOUGHT TO BE REVIEWED IS NOT FROM THE HIGHEST STATE COURT IN WHICH A DECISION COULD BE HAD.

This Court's certiorari jurisdiction over State courts is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. §1257. When a petitioner fails to ask a higher state appellate tribunal to

exercise its discretionary authority to review the ruling of a lower appellate court, this Court lacks jurisdiction to grant certiorari. See Banks v. California, 395 U.S. 708 (1969); Stratton v. Stratton, 239 U.S. 55, 56-57 (1915).

In New York practice, an order of the Appellate Term of Supreme Court is reviewable by the Appellate Division of the Supreme Court "by permission of the appellate term or, in case of refusal, of the appellate division." N.Y. Civ. Prac. Law §5703(a).

Petitioner sought the Appellate Term's permission to appeal to the Appellate Division and was denied; however, he never asked the Appellate Division to exercise its discretion to review the Appellate Term order. Accordingly, this Court has no jurisdiction to review the Appellate Term's order, and the petition must be denied.

POINT II

PETITIONER'S ACTION ALLEGES GOVERNMENTAL NEGLIGENCE AND RAISES NO FEDERAL CLAIMS.

Petitioner complains that respondent negligently disposed of petitioner's property while it was being stored by respondent after a marshal executed a warrant of eviction against petitioner and brought petitioner's property to respondent's warehouse. (A-1, A-3). Even if true, this claim raises no federal issues. In Daniels v. Williams, 474 U.S. 327, 334 (1986), this Court held that a "mere lack of care . . . does not implicate the Due Process Clause of the Fourteenth Amendment." There are no other provisions of the Constitution implicated by petitioner's claim.

Nor can petitioner complain that the merits of his suit were not reached because of the one year and 90-day statute of

limitation period. It is unquestioned that states may establish time limits for bringing actions based on state law. See Sun Oil Co. v. Wortman, ___ U.S. ___, 108 S. Ct. 2117, 2126 (1988) ("A State's interest in regulating the work level of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations.")

Briefly stated, there simply is no federal claim in this case and no reason for issuance of a writ of certiorari.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

October 4, 1988

Respectfully submitted,

PETER L. ZIMROTH,
Corporation Counsel of the
City of New York,
Attorney for Respondent.

LEONARD J. KOERNER,*
FAY LEOUSSIS,
ALAN G. KRAMS,
of Counsel.

*Counsel of Record.

PETITIONER'S ENDORSED COMPLAINT

Claim T-11914

Plaintiff:	Paul Emile Noel
Mailing Address:	648 East 40th Street Brooklyn, New York 11203
Living Address:	116 Williams Avenue Brooklyn, New York 11207
Defendant:	The Department of Sanitation of the City of New York

Cause of Action: Loss of personal property due to carelessness and negligence of the Department of Sanitation of the City of New York and, it was on or about the 24th day of August 1981 at 172 Vanderbilt Avenue, Brooklyn, New York, my personal property was damaged or stolen while in the possession of the City of New York, Department of Sanitation of the City of New York, their agents, servants and employees; and the damage claimed is personal property consisting of three rooms of furniture and furnishings in addition to 1 Stereo, 1 Television Set, bookcases, kitchen utensils etc. . . evaluating $25,000. Furniture and articles were located at 825 Crown Street, Apt. B-7, Brooklyn, N.Y. 11213 and they were taken illegally by the Order of the Marshalls, Moshe E. Eisenberg and his partner Jesse A. Gardner since June 1, 1981 and they were also sold at public auction on

8-24-81, RE, Encumbrance Unit, Department of Sanitation, 125 Worth Street, New York, N.Y. 10013, Seizure #J-6595. I want to reimburse $25,000.

/s/ Paul Emile Noel

EXCERPT FROM TRANSCRIPT OF TRIAL IN NEW YORK CITY CIVIL COURT

THE COURT: Please tell me what that arises out of; why do you say that the Department of Sanitation of the City of New York owes you that amount or any amount of money?

THE WITNESS: The legal action that I'm taking against the Department of Sanitation of the City of New York in the amount of $25,000 is for loss of my personal property due to the carelessness and negligence of its department.

PETITIONER'S MOTION IN APPELLATE TERM FOR LEAVE TO APPEAL TO APPELLATE DIVISION

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM: FIRST DEPARTMENT
----------x
PAUL EMILE NOEL,
PETITIONER,
v.
DEPARTMENT OF SANITATION OF THE CITY OF NEW YORK,
DEFENDANT.
----------x

NOTICE OF MOTION
COURT INDEX NO. 4388/85
NY COUNTY CLERK #92407/87

TAKE NOTICE that upon the annexed affidavit of Paul Emile Noel, sworn on to June 29, 1988, and the exhibits annexed thereto, and upon the proceedings heretofore had herein, petitioner-appellant will move this Court at a Motion Term at the Courthouse, located at 60 Centre Street, New York, New York, on July 7th, 1988 at 10:00 A.M. for permission to appeal to the appellate Division, First Department from an order of the appellate Term filed on April 6,

1988, pursuant to the Supreme Court of the United States 21.1(k) which required the opinions of the State Court of Appeals be exhausted in a petition for writ of certiorari received on June 20, 1988.

Dated: June 29, 1988

Paul Emile Noel
Petitioner Pro se
101 Lafayette Avenue,
Apt. 3 E
Brooklyn, N.Y. 11217

TO: Peter L. Zimroth
Corporation Counsel
The City of New York, Law Department
100 Church Street
New York, N.Y. 10007

APPELLATE TERM ORDER DENYING LEAVE TO APPEAL

At an Appellate Term of the Supreme Court, first department, held at the Court House, Borough of Manhattan, City of New York, on the 22nd day of July, 1988.

PRESENT:
HON. JAWN A. SANDIFER, J.P.
HON. STANELY S. OSTRAU
HON. EDITH MILLER
Justices.

----------x

PAUL EMILE NOEL,

Plaintiff-Appellant,

-against-

DEPARTMENT OF SANITATION OF THE CITY OF N.Y.,

Defendant-Respondent.

----------x

ORDER UPON MOTION.
92407/1987
Cal. No. 87-464
November 1987 Term

The above named appellant having by notice of motion dated the 29th day of June

1988 moved for an order granting leave to appeal to the Appellate Division - First Dep't from an order of this Court dated April 6, 1988,

Now upon reading and filing said notice of motion and the affidavit of Paul Emile Noel verified the 29th day of June 1988 and the papers annexed in favor of said motion, and the statement of Alan G. Krams affirmed the 5th day of July 1988 and the papers annexed in opposition thereto,

IT IS ORDERED that said motion be and the same hereby is denied with $10 costs.

Enter,

/s/

Justice, Appellate Term

Supreme Court, first dept.

RESPONDENT'S AFFIRMATION OPPOSING PETITIONER'S MOTION FOR LEAVE TO APPEAL

NEW YORK SUPREME COURT
APPELLATE TERM: FIRST DEPARTMENT

PAUL EMILE NOEL,

Plaintiff-Appellant,

-against-

DEPARTMENT OF SANITATION OF THE CITY OF NEW YORK,

Defendant-Respondent.

AFFIRMATION IN OPPOSITION TO MOTION
Index No. 92407/87

ALAN G. KRAMS, affirms the truth of the following under the penalties of perjury:

1. I am an attorney duly admitted to practice in the Courts of this State, and I am an Assistant Corporation Counsel to PETER L. ZIMROTH, Corporation Counsel, attorney for defendant - respondent (hereinafter "respondent") in the above-entitled action.

2. This affirmation is submitted in opposition to appellant's motion for leave to appeal to the Appellate Division, First Department from the order of this Court, entered April 6, 1988, unanimously affirming the judgment of the Civil Court, New York County (Schwartz, J.), entered February 25, 1987, dismissing the complaint.

3. Appellant's motion is untimely, and this Court has no jurisdiction to grant leave to appeal. On May 4, 1988, I served appellant with a copy of this Court's order and notice of its entry by mailing it to the address designated by appellant for this purpose. Appellant obviously received it, since he attached a copy of the order and notice of entry to his moving papers. On the same day that I mailed the order and notice of entry to plaintiff, I executed an affirmation attesting to that fact and attached it to my copy of the papers served. Attached hereto as Exhibit 1 are copies of

the order and notice of entry I served on plaintiff as well as my affirmation of service.

4. Since service was by mail, appellant had 35 days from the date of mailing to make his motion for leave to appeal. See CPLR 5513(a); 2103(c); 2103(b)(2). Appellant was required to move for leave to appeal no later than June 8, 1988. His motion, dated June 29, 1988, is obviously untimely and must be denied. See Reinfeld v. 325 West End Corp., 43 AD2d 671 (1st Dept., 1973) (time limits for seeking appeal are not waivable); Ruggiano v. Board of Education, 42 AD2d 911 (2d Dept., 1973) (appeal dismissed where motion for leave in Appellate Term was untimely).

5. Even if appellant's motion were timely, it should not be granted. Appellant makes no attempt to demonstrate that this Court's ruling was erroneous or involves important issues warranting review by the Appellate Division. Respondent refers the

Court to the brief it filed on this appeal for a statement of the reasons why the Civil Court's order was properly affirmed. Respondent's brief is annexed as Exhibit 2.

WHEREFORE, it is respectfully requested that appellant's motion be denied.

Dated: New York, New York
July 5, 1988

/s/

ALAN G. KRAMS